Supreme Court, U.S.
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91-2061
No. ——

IN THE
Supreme Court of the United States
OCTOBER TERM, 1991

ARTHUR D. JACOBS,
Petitioner,

v.

WILLIAM BARR, *et al.*,
Respondent.

Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. In going beyond the question presented for review and directly addressing the merits of the underlying case, which had not been addressed by the District Court and for which petitioner was never permitted discovery, did the United States Court of Appeals for the District of Columbia Circuit abuse its discretion?

2. In finding the Civil Liberties Act of 1988 and the Aleutian and Pribilof Islands Act constitutional, did the United States Court of Appeals for the District of Columbia Circuit err, as the Acts violate the right to equal protection of the laws guaranteed to petitioner by the Fifth Amendment to the United States Constitution?

LIST OF PARTIES

The parties to the proceedings below were the petitioner, Arthur D. Jacobs, and the respondents, the United States Attorney General and the Secretary of the Treasury of the United States.

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Arthur D. Jacobs petitions for a writ of certiorari to review the opinion and the judgment of the Court of Appeals for the District of Columbia Circuit entered in this case on March 27, 1992.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the District of Columbia Circuit (Appendix A, *infra*) is reported at 959 F.2d 313 (1992). The opinion of the United States District Court for the District of Columbia Circuit (Appendix B, *infra*) is not reported.

JURISDICTION

The opinion of the United States Court of Appeals for the District of Columbia Circuit was filed on March 27, 1992. That Court's order vacating the opinion of the

District Court was entered on March 27, 1992. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Fifth Amendment to the United States Constitution provides, in pertinent part:

> No person shall be . . . deprived of life, liberty, or property, without due process of law . . .

The Civil Liberties Act of 1988, 50 U.S.C. § 1989b (Appendix C) provides, in pertinent part, for monetary compensation in the amount of $20,000 to Americans of Japanese descent who were relocated or interned during World War II, or their heirs.

The Aleutian and Pribilof Islands Restitution Act, 50 U.S.C. § 1989c (Appendix D) provides, in pertinent part, for monetary compensation in the amount of $12,000 to residents of the Aleutian and Pribilof Islands, or their heirs, who were relocated or otherwise burdened by the United States government during World War II.

STATEMENT OF THE CASE

The term "judicial activism" is a term so often exploited in contemporary legal demagoguery that its meaning has been diluted. However, in the case at hand, the Court of Appeals engaged in a display of judicial activism that was so political in nature, and so blatant in lack of authority, as to remind us once again that judicial activism is, in effect, the politicization of the judicial branch which serves to produce no true victors.

In forming a tripartite system of government, the authors of the United States Constitution endeavored to ensure that each of the executive, legislative and judicial branches would be prohibited from abusing the power which the Constitution vested in them. As understood

then, the system of "checks and balances" would provide, in the form of the federal judiciary, a truly just form of justice.

Through the more than two centuries that this form of government has endured, it has been tested by individuals in the respective governmental branches who, through the use of apparent authority, wish to exceed the limits of the power of their office. Perhaps the most dangerous and least addressable form of such abuse arises in the form of judicial activism.

Because federal judges are not subject to direct check by any other branch of government—because the only restraint on the exercise of their power is self-restraint—procedural rules and doctrines of restraint must be meticulously observed by the majority of this nation's federal courts to prevent the federal judiciary from becoming a political free for all.

This is particularly apparent where, as with the case at hand, judicial activism has resulted in more than a mere flouting of the rules, or a display of a partciular court's political agenda: it has produced an inconsistent and dangerous holding regarding equal protection under the laws of the United States which will effect not only the petitioner, but all citizens of the United States who are discriminated against by the federal government based solely on ethnic origin. The Court of Appeals has, in this case, so far departed from the accepted and usual course of judicial proceedings as to call for an exercise of This Honorable Court's power of supervision because in its decision to go beyond the issue appealed and reach the merits of the case at hand the Court of Appeals abused its discretion, and because its resolution of the merits was plainly incorrect.

Petitioner

Petitioner, an American citizen of German ancestry, was born in Brooklyn, New York in 1933. As a result of the internment of his German father, and for no other

reason, the petitioner, at age 12, was interned at Ellis Island, New York on February 27, 1945.[1] The petitioner remained at Ellis Island until April 26, 1945, when he and his family were transferred by the United States Government to the Crystal City, Texas internment camp, where they arrived on April 29, 1945.

The internment of the petitioner's father was in direct contradiction of the recommendation of the parole board who heard his case. For despite the recommendation of the parole board which reviewed the case of petitioner's father that he not be interned, he was nonetheless singled out for internment.[2] Petitioner and other family members were interned along with petitioner's father, just as the families of other adult internees were kept with their parents in the internment camps.[3]

Petitioner and his family remained at the Crystal City, Texas internment camp until December 1, 1945, when they were transferred back to Ellis Island, New York, arriving there on December 4, 1945. This was months after the United States had ended its war with Germany.

While confined to the internment camp at Crystal City, the petitioner met and made friends with Japanese children and American children of Japanese descent who were, like him, also interned at Crystal City as a result of the internment of their parents. Based upon his daily contact with his peers of Japanese descent at the intern-

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[1] A crucial distinction, and one which appears to have escaped the attention of the Court of Appeals, exists between "internment" and "relocation." Petitioner wishes to make clear at the outset that, as an internee, he was not free to leave the Crystal City internment camp.

[2] Absent any opportunity for discovery, petitioner is without knowledge as to whether the decision to intern his father was the result of discriminatory sentiment on behalf of certain members of the Department of Justice.

[3] As a twelve year old child, petitioner was without choice as to whether he would be sent to the internment camp with his father, and was never given a hearing at which an alternative was presented.

ment camp, petitioner observed identical conditions for those of Japanese descent and of German descent throughout the duration of his internment.

The Civil Liberties Act of 1988 and the Aleutian and Pribilof Islands Restitution Act

On August 10, 1988, the United States Congress enacted the Civil Liberties Act of 1988 (hereinafter "1988 Act") to make reparation to United States citizens of Japanese ancestry and resident Japanese aliens who were relocated or interned during World War II. The stated purpose of the reparation was to compensate persons of Japanese ancestry, or their heirs, for what were determined to be fundamental violations of their basic civil liberties and constitutional rights which occurred as a result of their relocation or internment during World War II.

In order to effectuate reparation under the 1988 Act, Congress authorized the creation of a fund, the Civil Liberties Public Education Fund. Under the 1988 Act, the Attorney General of the United States is required to identify and locate each individual eligible for payment, and the United States Secretary of the Treasury is required to disburse from the Civil Liberties Public Education Fund the sum of $20,000.00 to these individuals, unless an eligible individual refuses the payment.

As a companion to the 1988 Act, Congress enacted the Aleutian and Pribilof Islands Restitution Act of 1988 (hereinafter "Islands Act") in an effort to provide appropriate compensation for losses to residents of the Aleutian and Pribilof Islands which were attributable to the conduct of the United States Armed Forces and other officials or employees of the United States Government during World War II. Similar to the 1988 Act, the Islands Act established the Aleutian and Pribilof Islands Restitution Fund and provides that the Secretary of the Treasury shall pay to each eligible individual the sum of $12,000.00, unless that individual refused the payment.

Procedural History

On March 9, 1989, the petitioner filed a Complaint for Injunctive Relief and Declaratory Judgment in the United States District Court for the District of Columbia. In essence, the petitioner challenged the constitutionality of the Civil Liberties Act of 1988 and the Aleutian and Pribilof Islands Restitution Act, 50 U.S.C.A. § 1989 *et seq.*

Petitioner complained in the District Court that the 1988 Act and the Islands Act are unconstitutional, as they deny the petitioner equal protection of the laws in violation of the Fifth Amendment to the United States Constitution. Specifically, petitioner complained that the 1988 Act and the Islands Act provide reparations to a limited class of individuals who were relocated or interned during World War II, while denying reparations to identically situated individuals, i.e. the petitioner, with the only distinction being the individual's ethnic origin. Petitioner alleged that he suffered the identical violations of basic civil rights acknowledged by Congress in the 1988 Act and the Islands Act, yet he is denied benefits under the Act solely as the result of his ethnic origin.

Because of the nature of the claim, the named defendants (respondents in this action) are the United States Attorney General and the United States Secretary of the Treasury.

Following the filing of the complaint, the Japanese American Citizens League, the Japanese American Citizens League Legislative Education Committee and others moved to intervene. The trial court, over objection by the petitioner, permitted the intervention.

Following the permission to intervene, the defendants/respondents moved to dismiss the complaint, citing lack of standing and alternative grounds. The motion was filed prior to the taking of any deposition or other dis-

covery by the petitioner. Although the petitioner wished to conduct discovery crucial to his case,[4] no discovery was permitted by the trial court.

In an Order dated January 22, 1991, the United States District Court for the District of Columbia dismissed the petitioner's Complaint. The trial court held that the plaintiff/petitioner lacked standing to challenge the constitutionality of the Acts. The District Court limited its holding to the issue of standing, and did not address the alternative grounds raised by the defendants/respondents.

Specifically, the District Court stated:

> Due to the failure of the plaintiff to establish standing, this action must be dismissed and the Court need not address the second part of the [defendant/respondent's] motion.

The second part of the defendant/respondent's motion addressed the merits of the case.

On February 8, 1991, the petitioner timely filed an appeal of the District Court's January 22, 1991 order in the Court of Appeals for the District of Columbia Circuit. As the basis of his appeal, the petitioner presented the issue as to whether the District Court failed to apply appropriate criteria in determining standing. The standing issue was the only issue presented to the Court of Appeals for review. Furthermore, the issue concerning standing criteria was the sole issue appealed by *either* party, as the defendants/respondents did not file a cross appeal with the Court of Appeals for the District of Columbia Circuit.

In their brief to the Court of Appeals action, the respondents wrote:

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[4] Counsel for the respondent, the United States Department of Justice, is sole custodian of voluminous documents which support the petitioner's case and, absent discovery under the Federal Rules of Civil Procedure, petitioner is without access to the information contained therein.

> "If this Court rules that Jacobs has standing, it should affirm the District Court's judgment on the alternative ground that the Acts which Jacobs has challenged are constitutional. The government moved to dismiss on this ground in the district court and filed a brief that fully addressed this issue. Jacobs also addressed this issue in his pleadings. This issue is ripe for decision, and a remand on it would not serve any useful purpose."

Brief for Appellee at 21.

After hearing oral argument of the case on December 6, 1991, the Court of Appeals issued an opinion on March 27, 1992. While the District Court found for the petitioner as to the issue presented to the Court of Appeals and confirmed that the petitioner did indeed have standing, the Court of Appeals then went beyond the issue presented to it for appeal and ruled on the merits of the case. Despite the lack of discovery on the part of the petitioner, the Court of Appeals ruled that the Acts were constitutional.

In light of the decision by the Court of Appeals to go beyond the issue presented to it and to rule on a case in which discovery had not been permitted, petitioner seeks certiorari from This Honorable Court.

REASONS FOR GRANTING THE WRIT

In its decision to go beyond the issue appealed and reach the merits of the case at hand, the United States Court of Appeals clearly abused its discretion. Furthermore, by reaching beyond the issue appealed and addressing the merits of the case, the Court of Appeals violated the petitioner's guarantee of due process under the Fifth Amendment of the United States Constitution. Finally, the Court of Appeals was flatly incorrect in holding that the 1988 Act and the Islands Act are constitutional, setting a dangerous precedent for the future of equal protection under the laws of the United States.

I. IN GOING BEYOND THE ISSUE PRESENTED, THE COURT OF APPEALS ABUSED ITS DISCRETION AND IMPROPERLY ADDRESSED THE MERITS OF THE UNDERLYING CASE.

The extent of a court's power of review is dependent upon the nature of the decision from which a party appeals. In the case at hand, petitioner appealed from the District Court's dismissal for lack of standing. As the District Court specifically stated that it did not have occasion to rule on the merits, petitioner did not appeal any issue regarding the merits, and the respondent never filed a cross appeal to that effect.

When the District Court dismissed petitioner's case for lack of standing, its decision constituted a dismissal for lack of jurisdiction. For in order for a court to have jurisdiction over a matter, the plaintiff must have standing to bring suit in that court, and the matter must be one for which the court has authority. The Court of Appeals has power to review only questions of law which are properly preserved for review, and it does not have the power to try or retry cases. *O'Malley v. Cover*, 221 F.2d 156, 159 (8th Cir. 1955).

The Court of Appeals is limited to addressing alleged specific erroneous rulings of the District Court. *See Ralston Purina Co. v. Novak*, 111 F.2d 632, 634 (8th Cir. 1940). In his appeal, the petitioner asked the Court of Appeals to review the only ground on which the District Court had ruled: *the issue of standing*. The petitioner *never* asked the Court of Appeals to address the merits of the underlying case, and the respondent *never* filed a cross appeal.

A. The Court of Appeals was Without Power to Address the Merits of the Case, as They Were Not Necessary to a Disposal of the Case as Presented to the Court of Appeals, nor Were They Presented for Appeal.

A Circuit Court of Appeals cannot consider a question not ruled upon by a trial court at trial. It is well settled that where a District Court dismissed a complaint and ruled that it lacked jurisdiction, it could not have intended to rule upon any other question. *Pagano v. Brownell*, 227 F.2d 36, 37 (D.C. Cir. 1955). Thus, in the case at hand the District Court's failure to rule on the merits must be taken as such, and the Court of Appeals cannot be permitted to disregard this and address the merits simply because they feel they know the "correct" answer to questions now presented for their review.

This Honorable Court has long recognized that when a United States Court of Appeals is reviewing the ruling of a District Court which in no way reaches the merits of the underlying case, the Court of Appeals is without jurisdiction to adjudicate the merits of a party's constitutional contentions. *See Goosby v. Osser*, 409 U.S. 512, 523, 93 S. Ct. 854, 861 (1973).

In *Goosby v. Osser*, This Honorable Court found that where the Court of Appeals was charged with reviewing whether the District Court erred in determining that appellants were not entitled to a three-judge court, it did not have jurisdiction to render a holding implying adjudication on the merits of the appellant's constitutional contentions. There, the Court of Appeals had stated:

> "We have carefully considered each of the contentions raised by the [petitioners] and find them to be without merit."

Id. at 523, 93 S. Ct. at 861. For that ruling on the merits, This Honorable Court found that the Court of Appeals had exceeded the scope of its powers.

Although, in the case at hand, the Court of Appeals was reviewing a different error of a district court, the District Court's error in petitioner's case is of the precise nature as that of the District Court in *Goosby v. Osser*. In both cases, the District Court dismissed the case on jurisdictional grounds and failed to reach the merits. In both cases, the Court of Appeals disagreed with the District Court's jurisdictional holding, yet went ahead and addressed constitutional contentions not addressed by the District Court. Therefore, as the Court of Appeals abused its discretion in *Goosby v. Osser*, so too does the Court of Appeals in the case at hand.

An extremely troubling aspect of the decision by the Court of Appeals was its reliance on incomplete facts, set forth only by the respondent and to which the petitioner was incapable of reply, as the petitioner was denied an opportunity for discovery. *See* Section I(C), *infra*. By engaging in a half-cocked fact finding expedition, the Court of Appeals was in effect serving as trial court in this case, in direct violation of its mission as a court of appellate review.

Plainly stated, questions neither considered nor decided by a District Court cannot be considered by a Circuit Court of Appeals. Furthermore, an appellate court cannot provide appellants with a trial de novo, yet that is precisely what the Court of Appeals did for the appellee in this case.

B. The Ruling on the Merits by the Court of Appeals Amounted to an Enlargement of the Rights of the Respondents, Which is Prohiibted Absent a Cross Appeal.

An appellee must file a cross appeal where the appellee seeks an enlargement of its rights through the Court of Appeals. *Sellers v. United States*, 902 F.2d 598, 603 (7th Cir. 1990). And despite the respondents' attempt to cloak their request to address the underlying merits as a request to rule on "alternative grounds," the move

from dismissal for want of standing to a decision on the merits was a clear and indisputable enlargement of the respondents' rights. Therefore, the respondents erred in requesting a ruling on the merits without a cross appeal, and the Court of Appeals erred in enlarging respondents rights through addressing the merits.

In its brief to the Court of Appeals, respondents asked the Court of Appeals to "uphold," on "alternative grounds," the dismissal by the District Court. Petitioner does not dispute that a district court's decision can be upheld on grounds that are different from one expressed by a district court. *See Conecuh-Monroe Community Action Agency v. Bowen*, 852 F.2d 581 (D.C. Cir. 1988). However, in this case the Court of Appeals did not *uphold* the decision of the District Court. Here, the Court of Appeals *vacated* the District Court's dismissal of the case, and exceeded the scope of its power of appellate review by deciding the merits, which had never been completely addressed by the petitioner. By so doing, the Court of Appeals served to enlarge the rights of the respondent, as the case went from being dismissed on jurisdictional grounds to being fully and finally decided on the merits.

Such a clear abuse of the Court of Appeals' descretion mandates a grant of certiorari by This Honorable Court. For even an institution as venerable as the United States Department of Justice cannot deem the merits in this case to be "alternative grounds" for upholding a dismissal, simply by classifying them as such.

Nor can the Department of Justice be permitted to fail to heed the procedural requirements of appellate litigation. The rules of the United States Court of Appeals clearly set forth the requirement for cross appeal. Perhaps the respondents presented their request for a ruling on the merits in their brief rather than by cross-appeal because they failed to meet a filing deadline. This absolutely cannot be tolerated from this nation's counsel.

The respondents, represented by the United States Department of Justice, never filed a cross appeal. Yet the Court of Appeals heeded their call to address the merits, even in the face of their failure to follow procedure. Nowhere is it written that the Department of Justice is held to a different set of requirements than the civil litigant who does not carry the title of the United States. If the Department of Justice is not held to basic procedural standards and safeguards, how can we realistically expect justice for the citizens of the United States?

C. The Court of Appeals was Flatly Incorrect When it Said that the Petitioner had an Opportunity to Address the Merits in its Pleadings, and their Determination on the Issue was Unfairly Prejudicial.

In its decision, the Court of Appeals stated:

> "Although the District Court did not reach the merits of the case, the government argues that they are ripe for decision, and a remand would not serve any useful purpose. Mr. Jacobs addressed the merits in his pleadings, and the government briefed them below and on appeal. At oral argument, Mr. Jacobs' counsel argued strenuously for further discovery, but was unable to show how it could strengthen her client's case. . . . Given the overwhelming evidence supporting Congress' conclusion that there was no mass detention of Germans, and given our deference to Congress' fact finding, we do not agree that further discovery on a scrupulously reported historical question would cast any useful light on the case."

Appendix A at 9.

Notwithstanding the characterization of the record, a ruling on the merits amounted to a denial of discovery here. In going beyond the issue appealed and addressing the underlying merits of this case, the Court of Appeals did so relying on "facts" alleged by the respondents as well as their intervenors, the Japanese American Citizens League. At oral argument, counsel for petitioner

explained to the Court of Appeals that it was not possible to rebut the respondent's allegations without first conducting discovery, as the United States Department of Justice—again, counsel for respondents in this action—controlled all access to documents pertaining to petitioner's case.

Perhaps the Court of Appeals failed to recognize that through its control of access to the documents in this case, the Department of Justice and the respondents in turn controlled the facts. In order to argue his case effectively, the petitioner needed to conduct discovery through requests for production of documents and service of interrogatories which would allow him to demonstrate the merits of his argument.

As the District Court never allowed the petitioner an opportunity for discovery, there was no way in which he could have addressed the merits on appeal. Thus, the Court of Appeals was clearly wrong when it held that the merits had been addressed in the appellate pleadings submitted by petitioner.

Because federal judges are not subject to direct check by any other branch of government—because the only restraint on their exercise of power is self-restraint—they must make every reasonable effort to confine themselves to the exercise of the powers that the Constitution and Congress have given them. *See Wisconsin Knife Works v. National Metal Crafters*, 781 F.2d 1282 (7th Cir. 1986). Thus, the only way in which the petitioner may require the Court of Appeals to hold itself to addressing only those issues with which it is properly presented is to petition This Honorable Court through a Writ of Certiorari, to make clear to the court below its duty to exercise self-restraint.

The fact that the Court of Appeals would rule on the merits of this case relying solely on evidence presented and controlled by the respondents, and absent any oppor-

tunity for discovery by petitioner, is more than an insult and an affront to the petitioner and to those similarly situated. It was an abuse of that court's discretion, as the case should have been remanded in light of the court's findings of standing. For the several reasons stated above, This Honorable Court must grant this petition for certiorari in order to remedy what was in all respects a constitutionally disastrous course of action by the United States Court of Appeals for the District of Columbia Circuit.

II. THE 1988 ACT AND THE ISLANDS ACT ARE UNCONSTITUTIONAL, AS THEY VIOLATE THE EQUAL PROTECTION COMPONENT OF THE FIFTH AMENDMENT.

The Court of Appeals followed the invitation of respondents in characterizing the Acts in question as "benign race-conscious measures," borrowing from the well-founded body of constitutional law which allows legislation substantially related to an important public purpose and narrowly tailored to further a compelling interest. *See generally Metro Broadcasting, Inc. v. FCC*, 110 S.Ct. 2997 (1990). This "benign" characterization is not only an insult to those who suffer from discrimination as a result of the challenged Acts, but is also a perversion of constitutional law for which *Metro Broadcasting* was not intended.

In order to address the effects of past injustice, the Congress of the United States possesses remedial powers. *Fullilove v. Klutzkick*, 448 U.S. 448, 483 (1980). However, this remedial power cannot be used in a discriminatory fashion. Such discriminatory use of Congress' remedial power is absolutely prohibited by the equal protection component of the Fifth Amendment Due Process Clause. *See, e.g., Washington v. Davis*, 426 U.S. 229 (1976) (The Fifth Amendment Due Process clause contains an equal protection component prohibiting the federal government from racial discrimination.)

In support of its finding that the challenged Acts are indeed Constitutional, the Court of Appeals gives much deference to Congress' findings in the report "Personal Justice Denied," touted by the respondents and their affiliated amici in the appellate court as dispositive on the issue of the constitutionality of the Acts. But the existence of Congress' findings concerning Japanese Americans during World War II, absent anything further, does not vitiate the invidious nature of the discrimination against the petitioner.

In its decision on the merits of the case, the Court of Appeals boldly asserts that petitioner "cannot show—he does not even allege—that he was interned because of racial prejudice." Appendix A at 13a. This, however, is a complete manipulation by the Court of Appeals of the facts behind Mr. Jacobs' position. Mr. Jacobs was never given access to the documents which could demonstrate that the internment of his father, which consequently led to his own internment, resulted from anti-German sentiment.[5]

The Court of Appeals went on to allege the following:

> "But this much is clear: Congress' finding that "no mass exclusion or detention . . . was ordered against American citizens of German or Italian descent" is broad enough to cover children as well as adults, and it leaves no room for the unlikely suggestion that German American children were the victims of prejudice, while their fathers were not."

Id. Such a bold determination, as it serves to control the court's finding on constitutionality, is dangerous,

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[5] The Court of Appeals appears to scold counsel for petitioner in its observation that "She did not know whether Mr. Jacobs was ordered by the government to accompany his father, or whether he went because his father chose to keep the family together." *Id.* at 13. However, this is but another example of that court's manipulation of the facts, as they fail to also point out that counsel for the petitioner needed to conduct discovery in order to ascertain the exact nature of the order of petitioner's internment.

as it entirely ignores the fact that the petitioner, who while interned at the Crystal City camp received treatment identical to that of his Japanese American peers, nonetheless cannot receive reparation, or even an apology, from the United States; yet under the same set of facts, he would reecive both were he Japanese-American rather than German-American. No matter how extensive the findings of Congress, that is discrimination based upon race, and is unconstitutional.

It is difficult for many to accept that remedial efforts in the interest of one ethnic group can serve to violate the constitutional rights of another ethnic group. Yet as this court recognized in *Regents of University of California v. Bakke*, 98 S. Ct. 2733 (1978), preferring members of any one group based on ethnic origin is discrimination for its own sake and is forbidden by the Constitution.[6]

As has been plainly set forth by This Honorable Court, the guarantee of equal protection cannot mean one thing when applied to one individual and something else when applied to a person of another color; if both are not accorded the same protection, then it is not equal. *Id.* at 2748. By basing its ruling on a report prepared by Congressional staffers, and on the "facts" as characterized by the respondents, the Court of Appeals apparently let its sympathies for the past injustices suffered by an ethnic minority cloud its judgment as to the constitutionality of measures seeking to remedy those injustices.

That the Court of Appeals saw fit to base its finding of constitutionality on an incomplete set of facts is alarming. The "facts" upon which it based its decision were one-sided, representing the view of respondents and their affiliated amici, not the view of Congress. No matter

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[6] In *University of California v. Bakke*, This Honorable Court addressed equal protection and state government action under the Fourteenth Amendment. While the case at hand involves equal protection and federal government action under the Fifth Amendment, identical concepts apply. *See, e.g., Washington v. Davis.*

what amount of "deference," or "great weight," a Court of Appeals is required to give the findings of Congress, the mere existence of Congressional findings does not serve to impart constitutionality upon a discriminatory act.

The finding of constitutionality by the Court of Appeals appears to be the work of an activist court seeking to control the use of the constitution for its own political ends. This is not a role to be permitted of any appellate court, as the laws of equal protection cannot be selectively applied at the whim of a federal judge.

Despite the best efforts of the United States Court of Appeals to frame Congress' discriminatory legislation in terms of Congress' good intentions, there is no escaping the Constitution's absolute prohibition against race-based discrimination. By declaring the Acts constitutional, the Court of Appeals compromised both the rights of the petitioner, and the Constitution itself.

CONCLUSION

The decision below, on an issue of profound national importance, constitutes a grave abuse of discretion by the Court of Appeals, a violation of the petitioner's right to equal protection under the Due Process Clause of the Fifth Amendment, and sets a seriously flawed precedent in the area of equal protection law. This petition for a writ of certiorari should be granted.

Respectfully submitted,

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